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No. 79-1406

In the Supreme Court of the United States

OCTOBER TERM, 1979

CITY OF LOS ANGELES, A MUNICIPAL CORPORATION,
PETITIONER

v.

GREATER WESTCHESTER HOMEOWNERS
ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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TABLE OF CONTENTS

Page

Statement 1

Argument 4

Conclusion 9

TABLE OF AUTHORITIES

Cases:

Aaron v. *City of Los Angeles*, 40 Cal. App. 3d 471, 115 Cal. Rptr. 162, cert. denied, 419 U.S. 1122 9

Air Transport Ass'n v. *Crotti*, 389 F. Supp. 58 4-5

Allegheny Airlines v. *Village of Cedarhurst*, 238 F. 2d 812 4

American Airlines, Inc. v. *Town of Hempstead*, 272 F. Supp. 226, aff'd, 398 F. 2d 369, cert. denied, 393 U.S. 1017 4

British Airways v. *Port Authority of New York*, 564 F. 2d 1002 4

British Airways Bd. v. *Port Authority of New York*, 558 F. 2d 75 ..... 4, 5, 6

City of Burbank v. *Lockheed Air Terminal*, 411 U.S. 624 ..... 3, 4, 6, 8

City of Dallas v. *Southwest Airlines Co.*, 494 F. 2d 773, cert. denied, 419 U.S. 1079 4

Griggs v. *Allegheny County*, 369 U.S. 84 ..... 3, 9

Page

Cases—(Continued):

Luedtke v. *County of Milwaukee*, 521 F. 2d 387 ..... 4, 5, 6, 8

Nat'l Aviation v. *City of Hayward*, 418 F. Supp. 417 5

San Diego Building Trades Council v. *Garmon*, 359 U.S. 236 8

San Diego Unified Port District v. *Gianturco*, 457 F. Supp. 283, pending, No. 78-3260 (9th Cir.) 5

Statutes and regulation:

Airline Deregulation Act of 1978, 49 U.S.C. (Supp. II) 1305(b)(1) 7

Airport and Airway Development Act, 49 U.S.C. 1701 *et seq.* 7

49 U.S.C. 1711(3)(C) 7

Aviation Safety and Noise Abatement Act of 1979, Pub. L. No. 96-193, 94 Stat. 50, 49 U.S.C. 2101 *et seq.* 7-8

49 U.S.C. 2104 8

Federal Aviation Act of 1958, 49 U.S.C. 1301 *et seq.* 3

14 C.F.R. Part 36.5 7

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's invitation of May 12, 1980.

STATEMENT

Petitioner City of Los Angeles, a California municipal corporation, owns and operates Los Angeles International Airport. In 1968, respondents, who own or occupy homes near the airport's two north runways, brought this action against the City for damages arising out of its operation of the airport (Pet. App. 4). Respondents sought compensation for alleged takings of their property by inverse condemnation and, on a nuisance theory, for personal injuries allegedly caused by the noise, smoke and

vibrations attributable to aircraft using the airport's two north runways (*ibid.*). Respondents' action was consolidated with certain condemnation actions that the City had brought to condemn other nearby properties (*ibid.*). The condemnation and nuisance claims were bifurcated, and the direct and inverse condemnation claims resulted in substantial awards that have been fully satisfied (*ibid.*).

After the subsequent trial of respondents' nuisance claims, the court found that the noise created by jet aircraft using the airport's two north runways created an actionable nuisance, giving rise to damages for "annoyance, inconvenience, discomfort, mental distress, and emotional distress" (Pet. App. 4-5), and that respondents' claim for personal injuries was independent of their claim for damages to their properties (*id.* at 5). Accordingly, some 41 plaintiffs were awarded nuisance damages in the aggregate sum of $86,000 for personal injuries inflicted from 1967, the completion date of the airport's north runways, to September 30, 1975, the date of final judgment (*ibid.*). The California Court of Appeal affirmed the judgment entered by the trial court on the principal issue of nuisance liability (Pet. App. 30).

On appeal to the California Supreme Court, the City attacked the judgment on two grounds. First, the City asserted that it could not be liable for such damages because the tortious activities originated from in-flight aircraft over which the federal government is said to exercise exclusive control. The City further contended that the federal government had preempted any attempt by airport operators to control or reduce such noise. Second, the City argued that it was immune from nuisance liability because operation of the airport was expressly permitted by state statute. The California

Supreme Court found neither argument persuasive and unanimously affirmed the award against the City.[1]

In its opinion, the California Supreme Court examined this Court's decisions in *Griggs* v. *Allegheny County*, 369 U.S. 84 (1962), and *City of Burbank* v. *Lockheed Air Terminal*, 411 U.S. 624 (1973), as well as the Federal Aviation Administration's interpretations of those decisions. The court found that the federal government's substantial involvement in air navigation and aircraft noise control has been carefully limited to preserve the ability of airport proprietors to limit their liability for damages by employing reasonable, nondiscriminatory measures to reduce aircraft noise. The court found "significance in the depth and continuous nature of [the] City's involvement in the creation and maintenance of the nuisance in question" (Pet. App. 14). The court noted that the City had conceded that it was responsible for deciding where and how to operate the airport, and that the City had acknowledged its power to acquire aircraft noise easements from affected landowners through condemnation proceedings. Moreover, the court found nothing in the Federal Aviation Act of 1958, 49 U.S.C. 1301 *et seq.*, that would either give relief to airport noise victims or empower the federal government to adjudicate disputes between such victims and airport proprietors. Finally, the court found unpersuasive the City's assertion that imposition of nuisance liability for personal injuries

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[1]The City successfully challenged the trial court's award of prejudgment interest on both the condemnation and nuisance awards (Pet. App. 20-22). The City also challenged an award of attorneys' fees, which was vacated and remanded to the trial court (*id.* at 22-23).

would hinder commerce or interfere with federal policy. The court noted that similar liability has long existed with respect to the taking of property.[2]

The court also found no merit in the City's contention that the California legislature had granted immunity from nuisance liability by authorizing operation of the airport. The court stated that "although an activity authorized by statute cannot be a nuisance, the *manner* in which the activity is performed may constitute a nuisance" (Pet. App. 18; emphasis in original).

ARGUMENT

In our view, the decision below is plainly correct, does not create a significant conflict with other decisions and is not of sufficient importance to warrant review by this Court.

1. The noise associated with the operation of jet aircraft has generated a substantial body of federal law on the question of federal preemption of aircraft noise control.[3] All of these decisions recognize the preeminent

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[2]Chief Justice Bird concurred separately in the unanimous judgment. She carefully reviewed the relevant congressional and administrative materials and concluded that, "While federal regulation is extensive, both the legislative and executive branches have publicly emphasized local airport operators' responsibility for controlling airport noise through reasonable nondiscriminatory regulation" (Pet. App. 25).

[3]In addition to *City of Burbank* v. *Lockheed Air Terminal*, 411 U.S. 624 (1973), see *Allegheny Airlines* v. *Village of Cedarhurst*, 238 F. 2d 812 (2d Cir. 1956); *American Airlines, Inc.* v. *Town of Hempstead*, 272 F. Supp. 226 (E.D. N.Y. 1967), aff'd. 398 F. 2d 369 (2d Cir. 1968), cert. denied, 393 U.S. 1017 (1969); *Luedtke* v. *County of Milwaukee*, 521 F. 2d 387 (7th Cir. 1975); *British Airways Bd.* v. *Port Authority of New York*, 558 F. 2d 75 (2d Cir. 1977); *British Airways* v. *Port Authority of New York*, 564 F. 2d 1002 (2d Cir. 1977); *City of Dallas* v. *Southwest Airlines Co.*, 494 F. 2d 773 (5th Cir.), cert. denied, 419 U.S. 1079 (1974); *Air Transport Ass'n* v.

and exclusive authority of the federal government to regulate the flight of aircraft in the navigable airspace of the United States for the benefit of the public. But, since this Court's decision in *Burbank*, *supra*, a number of courts have concluded that the power of the federal government to regulate aircraft noise is not total, and that the Congress has carefully reserved a vital role for the airport proprietor.

In *British Airways Bd.* v. *Port Authority of New York*, 558 F. 2d 75 (2d Cir. 1977) (Kaufman, C.J.), the Second Circuit cogently explained the limited preemption principle that applies in the field of aircraft noise control. There, the operators of the Concorde supersonic transport sued the proprietor of John F. Kennedy Airport to overturn an airport ban that prevented the Concorde from serving New York in a 16-month demonstration experiment that the Secretary of Transportation had authorized. The district court found that the federal government had preempted the proprietor from banning the aircraft through its authorization of the demonstration flights. The Second Circuit reversed, holding that Congress had "provided for the promulgation by airport proprietors of reasonable regulations to establish acceptable noise levels for the airfield and its environs." *British Airways Bd.*, *supra*, 558 F. 2d at 78. To our knowledge, no federal court has repudiated or disagreed with this holding.[4]

Crotti, 389 F. Supp. 58 (N.D. Cal. 1975); *Nat'l Aviation* v. *City of Hayward*, 418 F. Supp. 417 (N.D. Cal. 1976); *San Diego Unified Port District* v. *Gianturco*, 457 F. Supp. 283 (S.D. Cal. 1978), 9th Cir., No. 78-3260 (9th Cir.), awaiting decision.

[4]In *Luedtke* v. *County of Milwaukee*, 521 F. 2d 387 (1975), the Seventh Circuit had previously rejected plaintiffs' contention that the General Mitchell Airport constituted a nuisance because of the manner in which it was operated. After a truncated analysis of the

2. In *British Airways Bd.*, the Second Circuit placed significant emphasis upon the *amicus curiae* submission by the United States. The court stated (558 F. 2d at 84):

> The FAA after thorough study has wholeheartedly endorsed a continued major role for airport proprietors in the development of noise abatement programs consonant with local conditions. See Dep't of Transportation, Aviation Noise Abatement Policy (Nov. 18, 1976). And, we interpret the Government's *amicus* brief in the case before us to be premised on the view that Congress has, by giving explicit sanction to this pattern of regulations, implicitly denied the executive the power to preempt operator-imposed noise restrictions regardless of the statutory source invoked to support federal administrative action.

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issue, the Seventh Circuit held that because "federal laws and regulations have preempted local control of aircraft flights," compliance with those laws and regulations is a full defense to a charge of nuisance. *Luedtke*, *supra*, 521 F. 2d at 391. While the Seventh Circuit cited this Court's decision in *Burbank* in support of its holding, that court did not carefully examine *Burbank* (see 411 U.S. at 635-636 n.14), and did not attempt to reconcile its disposition of the nuisance claim with its holding that under *Griggs*, *supra*, the landowners had a valid cause of action for inverse condemnation against the airport proprietor. *Luedtke*, *supra*, 521 F. 2d at 391. The federal noise policy that was recognized in *Burbank*, *supra*, 411 U.S. at 635-636 n.14, does not allow for "local control of aircraft flights" and, to that extent, the Seventh Circuit was correct. However, that court failed to recognize the broad arsenal of powers otherwise available to proprietors, which have been purposefully reserved to them because of their special ability to deal with local problems, and the court failed to recognize that the misuse or failure to use such powers could result in tort liability. In any event, the Seventh Circuit's decision has not been followed by other federal courts and does not represent a clear or significant conflict with the opinion below.

The executive branch's consistent interpretation is found not only in the Aviation Noise Abatement Policy to which the Second Circuit referred, but also in the regulations establishing maximum noise levels for aircraft engines. 14 C.F.R. Part. 36.5 provides:

> Pursuant to 49 U.S.C. 1431(b)(4), the noise levels in this part have been determined to be as low as is economically reasonable, technologically practicable, and appropriate to the type of aircraft to which they apply. *No determination is made, under this part, that these noise levels are or should be acceptable or unacceptable for operation at, into, or out of, any airport.* [Emphasis added.]

Thus, the executive branch as well as the federal courts have clearly recognized that federal law and policy respect the power of airport proprietors to take numerous steps to reduce aircraft noise in the airport environment.

3. In recent years, the Congress has taken a number of steps to assist airport proprietors in reducing airport noise. Since 1970, the Airport and Airway Development Act, 49 U.S.C. 1701 *et seq.*, has provided federal funding for airport development, including "any acquisition of land or of any interest therein necessary to insure that such land is used only for purposes which are compatible with the noise levels of the operation of a public airport." 49 U.S.C. 1711(3)(C). In the Airline Deregulation Act of 1978, Congress specifically preserved "the authority of any State or political subdivision thereof or any interstate agency or other political agency of two or more States as the owner or operator of an airport served by any air carrier certificated by the [Civil Aeronautics] Board to exercise its proprietary powers and rights." 49 U.S.C. (Supp. II) 1304(b)(1). Finally, in the Aviation Safety and

Noise Abatement Act of 1979, Pub. L. No. 96-193, 94 Stat. 50, 49 U.S.C. 2101 *et seq.*, a new mechanism was created whereby airport proprietors who have submitted an aircraft noise reduction plan to the Secretary of Transportation may also adopt a number of measures to reduce airport noise, including the implementation of a preferential runway system, use restriction by type or class of aircraft, construction of acoustical noise barriers and, to the extent approved by the Administrator of the FAA, "the use of flight procedures to control the operation of aircraft to reduce exposure of individuals to noise in the area surrounding the airport." 49 U.S.C. 2104. Surely, these explicit statutory measures, which were intended to assist and encourage airport proprietors in their noise control efforts, demonstrate that there is no merit to the City's assertion that it is unable to control airport noise effectively because of total federal preemption.

4. In sum, the California Supreme Court correctly ascertained the present state of federal preemption in the field of aircraft noise control. The City mistakenly attributes to *Burbank* a significance that this Court disclaimed when it stated, "We do not consider here what limits, if any, apply to a municipality as a proprietor." *Burbank*, *supra*, 411 U.S. at 635-636 n.14. Alternatively, the City attempts to fashion a new standard of total preemption in this area by "merging" certain aspects of the Court's opinion in *Burbank* with the Seventh Circuit's incomplete analysis in *Luedtke*, *supra*, and with the Court's holding in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959). That effort must fail, because the exclusive federal jurisdiction established by the National Labor Relations Act and reiterated in *Garmon* is substantially different in scope from the limited and carefully confined federal powers in the aircraft noise control area.

Nor is it relevant that, here, the City has been held liable in tort for personal injury, whereas the more frequent claim involves a taking of property by inverse condemnation.[5] The noises of jet aircraft landing and taking off from airports which cause personal injuries are the same noises that simultaneously cause takings of property. In both cases, such noise is the responsibility of airport proprietors who have built the airport, located the runways and maintain sole responsibility for the operational decisions at those facilities. Under this Court's ruling in *Griggs* v. *Allegheny County*, *supra*, the City of Los Angeles is liable for torts as well as for takings.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JULY 1980

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[5]It should be noted that the City's present claim of total federal preemption was previously rejected when the City sought to avoid liability for inverse condemnation. See *Aaron* v. *City of Los Angeles*, 40 Cal. App. 3d 471, 115 Cal. Rptr. 162 (1974), cert. denied, 419 U.S. 1122 (1975).